IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 10-0205

MICHELLE KULSTAD,

Plaintiff and Appellee,

v.

BARBARA L. MANIACI,

Defendant and Appellant.

On Appeal from the Montana Fourth Judicial District Court
Cause No. DR-07-34
Honorable Edward P. McLean

APPELLANT'S OPENING BRIEF

APPEARANCES:

APPELLANT:

Linda Osorio St. Peter, Esq.
ST. PETER LAW OFFICES, P.C.
2620 Radio Way
P.O. Box 17255
Missoula, MT 59808
(406) 728-8282

Austin R. Nimocks, Esq.*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
*Admitted *pro hac vice*

APPELLEE:

Michael G. Alterowitz, Esq.
ALTEROWITZ LAW OFFICES, P.C.
327 West Pine Street
Missoula, MT 59802
(406) 542-9904

Susan G. Ridgeway, Esq.
210 E. Pine Street, Suite 200
P.O. Box 8242
Missoula, MT 59807-8242
(406) 541-8882

Elizabeth L. Griffing, Esq.
ACLU OF MONTANA FOUNDATION
P.O. Box 9138
Missoula, MT 59807
(406) 830-3009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases: Page

Other State Cases:

Federal Constitutional Provisions, Cases, and other Federal Authorities:

State Constitutional Provisions and Statutes:

Administrative Regulations:

Other Authorities:

STATEMENT OF THE ISSUES

1. Whether the court-appointed therapist or the GAL can assert the right of privacy and privilege on behalf of minor children to deny parties to a parenting plan access to their children's therapy records.
2. Whether the GAL and therapist waived the children's psychologist-client privilege and right to privacy by providing therapy notes to both parties to the parenting plan.
3. Whether the Final Parenting Plan wrongfully penalizes Barbara Maniaci for exercising her constitutional right to travel.
4. Whether the court relied on evidence which violates Barbara Maniaci's due process rights.
5. Whether Barbara Maniaci, in violation of her due process rights, was denied a meaningful opportunity to confront and cross-exam expert testimony.

STATEMENT OF THE CASE

Defendant Barbara Maniaci appeals from a permanent protective order issued September 29, 2009, prohibiting her access to her minor children's therapy notes and from a subsequent order issued April 1, 2010, adopting a Final Parenting Plan which terminates her custody of her children and imposes supervised visitation of one week a month exercised only in the Missoula environs. (App. Docs. 5 and 15.)

STATEMENT OF THE FACTS

RE THERAPY NOTES

The Montana Supreme Court in *Kulstad v. Maniaci*, 352 Mont. 513, ___ P.3d ___ (2009), granted Michelle Kulstad ("Kulstad") parental rights over the adopted children of Barbara Maniaci ("Maniaci"). This highly contested litigation resulted in the application for three Writs of Supervisory Control[1] prior to the district court issuing its final opinion on September 29, 2008, which was appealed.[2] Prior to the appeal, the district court entered three separate orders giving parties access to all of the children's records. See App. Docs. 1, 2, and 3. Dr. Paul Silverman ("Silverman"), the court-appointed therapist for the minor children, provided parties, at their request, with his therapy notes. (2010 Parenting Plan Hr'g Tr. 652:3-7; 2009 TPO Hr'g Tr. 65:19-22). While the appeal was pending, Silverman stopped providing copies of his therapy notes after he received several letters from Maniaci's attorney questioning the tardiness of his distribution of his notes, and the incompleteness and inconsistencies in his notes. (2009 Hr'g Tr. 21:18-24; 2009 Hr'g Tr. 22:1-16.) Through Jo Antonioli, the Guardian ad Litem ("GAL"), Silverman sought a permanent protective order

---

[1] OP 07-0572, 11/07/07; OP 09-0127, 04/15/09; and OP 09-0260, 05/20/09

[2] *Kulstad v. Maniaci*, DA-08-0483, 10/01/08.

claiming the attorneys were taking an inappropriate role (2009 Hr'g Tr. 65-66:24-1) which lead Silverman to be concerned about sharing his notes with attorneys that may result in unnecessary litigation (2009 Hr'g Tr. 23:6-8; 2009 Hr'g Tr. 66:4-7), including litigation against himself which caused him to procure his own attorney. (2009 Hr'g Tr. 68:16-21.) "[I]f you had no copy of the record, then you would be less able to accuse me of various inconsistencies . . . ." (2009 Hr'g Tr. 75:1-5.)

According to Silverman, his notes contain information that "potentially encourages litigation." (2009 Hr'g Tr. 23:6-8.) The litigation will cause the children to be directly or indirectly exposed to increased hostility between the two caregivers (2009 Hr'g Tr. 23:8-14) which is not in the best interest of the children (2009 Hr'g Tr. 23:21-24, 2009 Hr'g Tr. 24:1-2).

A temporary protective order was immediately issued *ex parte* (App. Doc. 4). After a hearing held on July 9, 2009, the district court ruled that the protective order be made permanent (App. Doc. 5).

RE FINAL PARENTING PLAN

The court's interim parenting plan expired on September 29, 2009 (App. Doc. 6, p. 47, ¶8), which, in part, restricted the parties from traveling from Missoula without consent or court order. (App. Doc. 6, p. 38, ¶(c).) After the

GAL requested parenting plan proposals (App. Doc. 7), Maniaci relocated to Tennessee to join her husband, other family members and to find employment. (2010 Hr'g Exh. Q, App. Doc. 8.) In light of the district court's order forbidding either party to remove the children from the state,[3] Maniaci arranged for the children to stay with Kulstad for three weeks while she traveled to Tennessee on November 28, 2009. (2010 Hr'g Tr. 90:10-24, 91:1; 2010 Hr'g Tr. 108:18-20.) Maniaci subsequently decided to relocate there. (2010 Hr'g Ex. B; App. Doc. 10.) The parties stipulated that the children would remain in Missoula until entry of the Final Parenting Plan. (App. Doc. 11.) Neither Maniaci nor her husband could find employment in Montana. Maniaci and her husband found employment in Tennessee where she had family. (2010 Hr'g Exh. L; App. Doc. 12.) Maniaci was living in poverty in Montana. (2010 Hr'g Tr. 68:1-13.)

Maniaci notified the GAL and submitted a proposed revised parenting plan consistent with the Fourth Judicial District Visitation Guidelines for parents living more than 200 miles apart. (2010 Hr'g Tr. 22:2-11; 2010 Hr'g Exh. E; App. Doc. 13.) Maniaci, through her attorney, emailed Kulstad's attorney, Michael Alterowitz, Silverman, Dr. Cindy Miller ("Miller"), and the GAL (together

[3] *Standing Master Order*, 07/19/2007 (App. Doc. 9).

constituting PACT[4]) (App. Doc. 8) informing them of her relocation and asking for support and assistance to address the impact on the children since Kulstad had never had custody of the children for three consecutive weeks. (2010 Hr'g Tr. 573:12-574:21; 2010 Hr'g Tr. 444:7-13.) Maniaci was always the primary caretaker of the children. (2010 Hr'g Tr. 482:2-11; 2010 Hr'g Ex. S; App. Doc. 14.) She continued as the primary caretaker in the interim parenting plan (App. Doc. 6). In the interim parenting plan, Kulstad exercised approximately 10 days of visitation a month and alternate holidays. The GAL's Recommended Final Parenting Plan and PACT Program Final Report adopted by the Court was based on a determination by Child and Family Services Division ("CFSD"), a part of the Montana Department of Public Health and Human Services, that Maniaci psychologically abused her children by coaching and indoctrinating them against Kulstad. (2010 Hr'g Tr. 524-525; 2010 Hr'g Tr. 30:2-15; 2010 Hr'g Tr. 64:12-21; 2010 Hr'g Tr. 466:10-14; 2010 Hr'g Tr. 479:4-13; 2010 Hr'g Tr. 493:19-24; 2010 Hr'g Tr. 484:1.) CFSD based its decision that Maniaci was coaching and indoctrinating the children against Kulstad on the seven reports made to CFSD against Kulstad. Silverman made one report; Dr. Daniel Harper ("Harper"), the children's pediatrician made one report; one was made by Maniaci's attorney on

[4] PACT - Positive Alternative for Children Team

behalf of Harper; one was made by Kathryn White, corroborated by a call from Maniaci as the second reporter; one was made by Evy O'Leary, a therapist; and one was made by Destiny Pichon. (2010 Hr'g Tr. 125; 2010 Hr'g Tr. 127:1-18.) The GAL, Miller, and Silverman did not file reports against Maniaci to CFSD for coaching and indoctrinating or otherwise psychologically abusing her children. (2010 Hr'g Tr. 128:19-23; 2010 Hr'g Tr. 479:14-17; 2010 Hr'g Tr. 544:14-24; 2010 Hr'g Tr. 545:1-3.) No report of psychological abuse against Maniaci was filed. (2010 Hr'g Tr. 140: 19-22.) The final parenting plan stripped Maniaci of custody and directed that all of her parenting time be supervised and restricted to one week a month in the Missoula environs. (App. Doc. 15.)

STANDARD OF REVIEW

This Court reviews a district court's findings to determine whether the findings in question are clearly erroneous. *In re K.C.H.,* 2003 MT 125, ¶¶11-12, 316 Mont. 13, 68 P.3d 788. Findings are clearly erroneous when they are not supported by substantial credible evidence, the district court has misapprehended the effect of the evidence, or a review of the record leaves this Court with the conviction that a mistake has been committed. *In re T.C.* , 346 Mont. 200, 203, 194 P.3d 653 (2008).

The district court's conclusions of law are reviewed for correctness to determine whether the court correctly interpreted and applied the law. *In re M.P.,* 2008 MT 39, ¶ 17, 341 Mont. 333, 177 P.3d 495.

The district court's application of controlling legal principles to its factual findings is a mixed question of law and fact, which this Court reviews *de novo. State v. Weaver*, 342 Mont. 196, 201-02, 179 P.3d 534 (2008).

SUMMARY OF ARGUMENT

The district court relied erroneously on a 2005 New Hampshire case, *In re Berg,* 152 N.H. 658, 886 A.2d 980 (2005), to reach its conclusion that MCA §40-4-225 is superceded by the minor's constitutional rights of privacy. (App. Doc. 5.) New Hampshire does not have a statute similar to MCA§40-4-225 which specifically provides parents with broad and liberal access to their children's records. The GAL and Silverman waived the children's right to assert the minor children's right to privacy to privileged communication by releasing the children's ongoing therapeutic records. Rule 503, Mont. R. Evid. The Health Insurance Portability and Accountability Act ("HIPAA") specifically provides that state law which provides the greater rights from the patient's standpoint preempts HIPAA's general rule which prohibits access to psychotherapy notes. 45 C.F.R. § 160.203 and 45 C.F.R. Subpart B--Preemption of State Law § 160.202 (2).

Parents' rights prevail over the interest of a third party absent a showing of unfitness. *In re A.R.A.*, 277 Mont. 66, 919 P.2d 388 (1996). HIPAA regulations concur. Under 45 C.F.R. § 164.502(g)(5), a therapist cannot withhold records based simply on a therapist's subjective judgment that it is in the child's best interest unless there is also present abuse, neglect, or endangerment proven. No

abuse was alleged or proven at the July 9, 2009, hearing regarding a permanent protective order.

Maniaci has a constitutionally-guaranteed right to travel and cannot be penalized for exercising her right. *In re Marriage of Guffin,* 2009 MT 169, 350 Mont. 489, 209 P.3d 225 (2009). The district court may not penalize a parent for exercising her right to travel by removing her as the primary custodial parent of the children and it is an abuse of discretion to do so. *Id.* at 2009 MT 169, ¶12. *See also In re Marriage of Guffin*, 2010 MT 100. The Court and GAL chose to penalize Maniaci for moving to Tennessee over the best interests of the children. GAL testified that "it would be devastating to the children to be permanently separated from either parent," (2010 Hr'g Tr. 60:11-13) and due to their attachment disorder the children's ongoing contact with the Maniaci is indicated. (2010 Hr'g Tr. 61-62.) However, if Maniaci chooses not to parent her children in Montana then she is choosing to terminate her relationship with her children. (2010 Hr'g Tr. 64:2-7.)

The district court and the PACT program relied on CFSD's determination of abuse against Maniaci which was made in violation of Maniaci's constitutional rights. (App. Doc. 15, FOF 16, 17, 18, and 20, p. 33; COL 4 and 5, p.38) CFSD acknowledged, by and through its employees, Cherrill Rolfe ("Rolfe") and Nicole

Grossberg ("Grossberg"), that no report was filed against Maniaci by themselves or anyone else alleging psychological abuse (2010 Hr'g Tr. 128:12-23; 2010 Hr'g Tr. 544:14-545:3; that CFSD did not conduct an investigation, and CFSD made no finding of any kind as required under Title 41, Chapter 3, MCA §§41-3-201 and 41-3-202. Yet CFSD produced a case record which contained the conclusion that Maniaci psychologically abused her children. (2010 Hr'g. Exh. N, III (Historical Information) and V (Protective Capacities); App. Doc. 16.) After determining the category of expert evidence the court must next assess the relevance and reliability of the evidence. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 596, 113 S. Ct. 2786, 2798 (1993) (emphasis added). Here, the PACT Program, the GAL, and the Court based their opinion on the conclusion of CFSD that Maniaci psychologically abused her children by coaching them and others to make false reports. The conclusion of CFSD was made in violation of its internal protocol, in violation of administrative regulations, Mont. Admin. R. 37.47.613; 37.47.610; 37.47.608; 37.47.315(6); 37.47.303; 37.47.302; and 37.5.118, state statutes, MCA §41-3-201, *et seq.*, and in complete disregard of Maniaci's due process rights. CFSD's claim of psychological abuse is not reliable evidence upon which the PACT program and the experts, Miller and Silverman, or the GAL can rely.

Maniaci was denied a meaningful opportunity to confront and cross-exam expert testimony in violation of her due process rights. Silverman focused his testimony to the time period in which no written reports, notes or therapeutic information were provided to Maniaci about her children. (2010 Hr'g Tr. 553-554.) Miller relied on therapy information and notes from Silverman in preparing her PACT report to the court. (2010 Hr'g Tr. 414-416.) Silverman testified based on his therapy with the children and consultations with the parties. (2010 Hr'g Tr. 556-563.) After the hearing Silverman, changed his testimony and attached a copy of his "relevant portion of his notes" to which Maniaci was denied access. (App. Doc. 24.) Silverman's post-hearing testimony was not subject to cross-examination. The notes produced by Silverman were not made available to Maniaci for cross-examination. (App. Doc. 4.)

In preparing her final PACT Program Final Report, Miller did not meet with the children or Maniaci or Kulstad. (2010 Hr'g Tr. 478:15-24.) Miller did not make an independent investigation of whether the children are exposed to psychological abuse by Maniaci. (2010 Hr'g Tr. 479:9-13.) She did not contact Maniaci's therapists. (2010 Hr'g Tr. 486:7-12.) Miller relied on the reports of CFSD, Silverman's therapy, and [GAL] reports to the Court. (2010 Hr'g Tr. 485-486.) Until shortly before the hearing, Maniaci had no access to the reports to

CFSD.[5] At the hearing Maniaci had no access to Silverman's records from which he testified and from which Miller relied. (App. Doc. 4.) Maniaci was denied a meaningful opportunity to confront and cross-exam in violation of her due process rights and right to fundamental fairness.

[5] *Order* directing CFSD to disclose reports(ers), App. Doc. 17.

ARGUMENT

THE COURT ERRED BY DENYING PARENTAL ACCESS TO MINORS' THERAPY RECORDS

The district court relied erroneously on a 2005 New Hampshire case, *In re Berg,* 152 N.H. 658, 886 A.2d 980 (2005), to reach its conclusion that MCA §40-4-225 is superceded by the minor's constitutional rights of privacy. (App. Doc. 5.) New Hampshire does not have a statute similar to MCA §40-4-225 which specifically provides parents with broad and liberal access to their children's records.

> **Notwithstanding any other provision of law,** access to records and information pertaining to a minor child, **including but not limited to** medical, dental, law enforcement, and school records, may not be denied to a parent who is a party to a parenting plan. (Emphasis added.)

In *Berg,* the children were voluntarily placed in therapy by the mother with separate therapists of her choice. The father initiated a contempt motion and sought the therapist notes to prove his claim. The GAL moved to seal the children's records.

Here, the Court issued three separate orders[6] giving both parties access to the therapist records. Silverman voluntarily provided Maniaci and her attorney with his therapeutic notes in an effort to improve his relationship with Maniaci who was extremely opposed to him as the children's therapist believing he engaged in practices detrimental to her children's well-being. (2010 Hr'g Tr. 19:14-14, 2010 Hr'g Tr. 20:1-13.)

The privileged relationship between therapist and patient is the same as between an attorney-client. MCA §26-1-807. Both privileges can be waived. Rule 503, Mont. R. Evid. Voluntary disclosure is universally held to be a waiver of privilege. WIGMORE ON EVIDENCE, § 2325.

In *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (SDNY 1996), the Defendant put investigative notes from its attorney's interviews with employees into a report which was used by the Defendant to support its position that no laws had been knowingly violated. The Court held that such disclosure of partial notes of the attorney to third persons constituted a waiver of the attorney client privilege. Where the client uses an attorney tax opinion letter in promotional materials, the client has waived its right to claim privilege as to the

---

[6] *Order Regarding Educational Issues* filed May 22, 2007 (App. Doc. 1); *Order Revising Parenting Plan and Appointment of PAC Program* filed December 14, 2007 (App. Doc. 2); and *Pre-Trial Parenting and Discovery Order* filed February 14, 2008 (App. Doc. 3).

attorney-client communication. *See U.S. v. Jones*, 696 F.2d 1069 (4th Cir. 1982). Similarly, in *U.S. v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), it was held that disclosure of a tax opinion to the client's auditors destroyed any later assertion of attorney-client privilege as to communications between the attorney and client. In *Weil v. Investment/Indicator Research and Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981), the Defendant had disclosed confidential advice of its counsel concerning the need to register certain securities.

The Ninth Circuit specifically held that all materials bearing on the attorney opinion were discoverable. In its opinion, the Court relied on the following language from WIGMORE:

> When (the privilege holder's) conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final. VIII J. Wigmore, Evidence s 2291, at 636.

The GAL did not object to the three orders giving access to Silverman's records since 2007. The GAL received copies of the letters from Maniaci's attorney to Silverman which indicated that Maniaci and her attorney had been

receiving Silverman's therapeutic notes. (2010 Hr'g Tr. 56:19-22; App. Doc. 18, Exh. B.) The GAL and Silverman waived the children's right to assert the minor children's right to privacy to privileged communication by releasing the children's ongoing therapeutic records. Rule 503, Mont. R. Evid.

Unlike *Berg, supra*, no new litigation had been initiated when the GAL sought the protective order. The main appeal was pending. Only the threat of a motion to show cause was made to enforce the district court's prior orders to release the minor's records to Maniaci. (App. Doc. 18, Exh. C.)

Miller, the coordinator of the PACT program, supported the GAL's request for a protective order: " providing copies of therapeutic notes to attorneys who attempt to utilize the notes to further their adversarial goals is directly in conflict with the PACT objective and the children's best interest." (2010 Hr'g Tr. 2:11-13; App. Doc. 18, Exh. A.) However, there was no evidence that Maniaci's attorneys were attempting "to utilize the notes to further their adversarial goals." The only evidence admitted shows Maniaci's attorney attempting to enforce the three district court orders which had been previously issued. (App. Docs. 1, 2, and 3.)

After years of providing therapeutic records to the parties during the active litigation of the case, without objection by the GAL, it is unsupported and speculative to claim that the release of the records pending appeal "increase the

likelihood of additional litigation, . . . [or] increase the animosity that either caregiver felt for the other . . . directly, or indirectly, affect the children negatively." (2010 Hr'g Tr. 79: 6-12.)

The only precipitating event identified by the GAL and Silverman to seek a protective order is the letters from Maniaci's attorney to Silverman which placed him in fear of litigation against himself. (2010 Hr'g Tr. 21:18-24; 2010 Hr'g Tr. 22:1-16.)

Both the federal and state constitutions support parental rights as a fundamental liberty interest, closely guarded from government interference. *Polasek v. Mura*, 2006 MT 103, ¶14, 332 Mont. 157, ¶14, 136 P.3d 519, (the Montana and Federal Constitutions protect the right of parents to care for and raise their children). This includes access to necessary information. See *Defendant's Constitutional and Statutory Argument in Opposition to Protective Order*. (App. Doc. 19.)

MCA §40-4-225 codifies this right and reinforces that all parents have the right to access their children's medical records. *In re Parenting of J.N.P.*, 2001 MT 120, ¶23, 305 Mont. 352, ¶23. In Montana, therapist records are medical records. Montana law defines health care as "any care, service, or procedure provided by a health care provider, including medical or psychological diagnosis,

treatment, evaluation, advice, or other services that affect the structure or any function of the human body." MCA §50-16-504(4) (emphasis added). "Health care information" is also a defined term in Montana, it means "any information, whether oral or recorded in any form or medium that identifies or can readily be associated with the identity of a patient and relates to the patient's health care." MCA §50-16-504(6). Since health care and health care information includes everything that "affects the structure or any function of the human body" pursuant to MCA §50-16-504(4), it must include the records kept by therapists who treat the human mind.

Potential use of therapy notes in a later custody proceeding is not a basis to deny access to children's medical records. A custody dispute does not lessen the rights, duties, and obligations of parents. *In the Matter of M.W.*, 234 Mont. 530, 764 P.2d 1279 (1988). Parents continue to have the right to access their children's medical records regardless of the custody arrangement. *Id.* at 535. MCA §40-4-225 is clear and contains no exceptions–a parent's right to information concerning his or her children is absolute. *In re A.R.A.*, *supra.*

Withholding medical records from a parent in order to prevent its use in some hypothetical future litigation is insufficient to deny a parent his or her

constitutional right to raise his or her children without undue interference from the government. *Troxel v. Granville,* 530 U.S. 57, 68 (2000).

HIPAA specifically provides that state law, which provides the greater rights from the patient's standpoint, preempts HIPAA's general rule which prohibits access to psychotherapy notes. 45 C.F.R. § 160.203 and 45 C.F.R. Subpart B--Preemption of State Law § 160.202 (2).

Parents' rights prevail over the interest of a third party absent a showing of unfitness. *In re A.R.A., supra.* HIPAA regulations concur. Under 45 C.F.R. § 164.502(g)(5), a therapist cannot withhold records based simply on a therapist's subjective judgment that it is in the child's best interest unless there is also present abuse, neglect, or endangerment proven.

THE COURT'S ORDER VIOLATES MANIACI'S CONSTITUTIONAL RIGHT TO TRAVEL

Kulstad was awarded a parental interest in Maniaci's children. *Kulstad, supra.* This court distinguished *Kulstad* from *In re Parenting of J.N.P.,* 2001 MT 120, 305 Mont. 351, 27 P.3d 95, "on the basis that the nonparents in *J.N.P.* sought actual custody instead of a parental interest." *In re the Parenting of L.F.A., D.F.A.,* 2009 MT 363, 353 Mont. 220; P12. The district court's current decision strips Maniaci of her custodial rights and places sole custody in the nonparent,

Kulstad. Maniaci has supervised visitation only if exercised in the state of Montana.

The court reached this decision, in part, because after the one-year interim parenting plan had expired Maniaci relocated to Tennessee to join her husband and other family members and to find employment. (2010 Hr'g Tr. 240:19-24; 2010 Hr'g Tr. 241:1-18; 2010 Hr'g Tr. 251:20-24; App. Doc. 8.)

Maniaci has a constitutionally-guaranteed right to travel and cannot be penalized for exercising her right. *In re Marriage of Guffin,* 2009 MT 169, 350 Mont. 489, 209 P.3d 225 (2009). The district court may not penalize a parent for exercising her right to travel by removing her as the primary custodial parent of the children and it is an abuse of discretion to do so. *Id.* at 2009 MT 169, ¶12. *See also In re Marriage of Guffin*, 2010 MT 100. The final parenting plan adopted the recommendation of the GAL and PACT report. The final parenting plan effectively terminated Maniaci's parental rights. (2010 Hr'g Tr. 64:2-7.)

The Court and GAL chose to penalize Maniaci over the best interests of the children. GAL testified that "it would be devastating to the children to be permanently separated from either parent." (2010 Hr'g Tr. 60:11-13.) Due to their attachment disorder, the children's ongoing contact with Maniaci is indicated. (2010 Hr'g Tr. 61-62.) However, if Maniaci chooses not to parent her

children in Montana, then she is choosing to terminate her relationship with her children. (2010 Hr'g Tr. 64:2-7.) Because Maniaci is residing in Tennessee, she must visit her children in Montana. (2010 Hr'g Tr. 66:15-21.)

The Legislature explicitly exempted the change in residence provisions of MCA §40-4-219(1)(e) from any presumption that the moving parent is acting against the child's best interests simply because he or she changes her residence in a manner that significantly affects the child's contact with the other parent. *Guffin, supra.* It is evident here, as in *Guffin*, that the Court adopted the GAL's conclusion that Maniaci's decision to move to Tennessee was presumptively not in the best interest of the children. "Well, it seems to me that Barbara's choice to remain in Tennessee precipitates harm to the children by its very nature, ..." (2010 Hr'g Tr. 60:3-5.) The GAL's recommended final parenting plan allows for equal shared parenting plan only if Maniaci returns to Missoula, Montana. (2010 Hr'g Tr. 11:21-25; 2010 Hr'g Exh. O; App. Doc. 19.)

Rather than focusing on the best interest of the children, the court penalized Maniaci for her decision to relocate and relied on unsupported, speculative claims that Maniaci would not return her children if they traveled to Tennessee. (2010 Hr'g Tr. 569:6-24; 2010 Hr'g Tr. 570-572; 2010 Hr'g Tr. 26:4-9; 2010 Hr'g Tr.; App. Doc. 14, 38:18-20.) Or, Maniaci might initiate some legal action that would

defeat the jurisdiction and control of the district court. (2010 Hr'g Tr. 601:7-23.) It is an abuse of discretion and an error of law to rely on and adopt the conclusory and speculative evidence contained in the GAL's recommended final parenting plan (App. Doc. 14, 40:14-19) based merely on "concerns raised by MK through her attorney that her contact with the children would be terminated if the children were to leave the state of Montana." (2010 Hr'g Tr. 26.) Jennifer Walrod ("Walrod"), Maniaci's therapist, testified to the factors considered by Maniaci in relocating and she never indicated a motive to remove the children from Kulstad or obtain a legal advantage. (2010 Hr'g Tr. 194-195.) Moreover, the GAL and Miller testified that Maniaci never violated a court order. (2010 Hr'g Tr. 478:7-14; 2010 Hr'g Tr. 93:12-20.)

THE COURT'S ORDER RELIES ON EVIDENCE WHICH VIOLATES MANIACI'S CONSTITUTIONAL RIGHT TO DUE PROCESS

The district court relied on the GAL's Recommended Final Parenting Plan (App. Doc. 21) and the PACT Program Final Report (App. Doc. 20) in reaching its conclusions of law and incorporated those recommendations into its Findings of Fact and Conclusions of Law and Order Re: Parenting (App. Doc. 15). The GAL's Recommended Final Parenting Plan, the PACT Program Final Report, and the testimony of the GAL and Miller, in turn, relied on a determination made by CFSD that Maniaci was psychologically abusing her children. (2010 Hr'g Tr.

27:3-6; 2010 Hr'g Tr. 30:7-15; 2010 Hr'g Tr. 410:20-411:1-7; 2010 Hr'g Tr. 418:1-20.) This conclusion was reduced to a letter signed by Rolfe and Grossberg from CFSD. (2010 Hr'g Tr. 116:18-24.) It was attached and incorporated into the GAL's Recommended Final Parenting Plan and used in support of the PACT Program Final Report. (2010 Hr'g Tr. 524-527.)

As of February 28, 2008, Miller and Rolfe concluded that although Maniaci and Kulstad were making repeated referrals on each other, neither was viewed as being abusive. (2010 Hr'g Tr. 36:9-20; 2010 Hr'g Tr. 533:10-13.) No reports of abuse were filed against Maniaci after February 28, 2008. (2010 Hr'g Tr. 128:12-18; 2010 Hr'g Tr. 544:14-545:1-3.)

Although in their letter Grossberg and Rolfe accuse Maniaci of abusing her children, neither filed a report against her. (2010 Hr'g Tr. 128; 2010 Hr'g Tr. 525:15-24; 2010 Hr'g Tr. 526:3-5.) Both admit that if they have reasonable cause to suspect that a child is abused and neglected they are mandated to make a report. (2010 Hr'g Tr. 115:17-22; 2010 Hr'g Tr. 525:15-20.) They both agree that CFSD has no authority to make parenting plan or custody and visitation recommendations. (2010 Hr'g Tr. 139:21-24; 2010 Hr'g Tr. 534:16-20.)

No report was filed against Maniaci alleging psychological abuse and CFSD did not conduct an investigation. CFSD made no finding of any kind as required

under Title 41, Chapter 3, MCA §§ 41-3-201 and 41-3-202. Yet CFSD produced a case record in which it states that Maniaci coached the children and she is unable to protect her children. (App. Doc. 15.) CFSD's conclusion and allegation against Maniaci were made in violation of its internal protocol, in violation of administrative regulations, Mont. Admin. R. 37.47.613; 37.47.610; 37.47.608; 37.47.315(6); 37.47.303; 37.47.302; and 37.5.118, state statutes, MCA §41-3-201, *et seq.*, and in complete disregard of Maniaci's due process rights.

The admissibility of expert evidence requires that after determining the category of evidence the court must next assess the relevance and reliability of the evidence. *Daubert, supra,* (emphasis added). Here, the PACT program based its expert opinion on CFSD's determination that Maniaci psychologically abuses her children by coaching them and others to make false reports.

Rolfe testified that she made a mistake in the letter and did not really mean her recommendation that Maniaci visit her children only in Montana. (2010 Hr'g Tr. 534:21-24; 2010 Hr'g Tr. 535.) Rolfe testified that it was not her intention that her letter be used as a recommendation for a parenting plan. She intended the letter to make Maniaci attend a meeting with CFSD. (2010 Hr'g Tr. 535:4-21.) Rolfe and Grossberg agree that it is the policy of the state of Montana to ensure

that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect. (2010 Hr'g Tr. 535:22-24; 2010 Hr'g Tr. 536:1-3.)

Walrod is a former supervisor of Rolfe and Grossberg, and a former trainer and instructor at CFSD. (2010 Tr. 161-163.) Her expert opinion is that CFSD, through its letter and allegation of psychological abuse, made a dispositional decision by circumventing the process that protects parents. (2010 Tr. 177-178.) The letter exceeds the authority of CFSD (2010 Hr'g Tr. 179:5-9) and CFSD failed to follow its internal protocols and regulations which are designed to follow federal guidelines to protect parents' constitutional rights. (2010 Hr'g Tr. 163-179.)

In Walrod's expert opinion, it is not uncommon for there to be multiple unsubstantiated reports of abuse against the same children. (2010 Hr'g Tr. 184.)

Although the PACT team, including the GAL, had authority to contact Maniaci's therapist from an existing court order and from a release signed by Maniaci to her therapist, neither Miller nor the GAL contacted Maniaci's therapist in preparation of their final reports and proposals. Their failure to do so severely discounts the credibility and reliability of the PACT Program Final Report and the GAL's Recommended Final Parenting Plan and the testimony of the GAL and Miller as expert witnesses.

Walrod had a signed release from Maniaci to talk to Miller, Silverman, and the GAL. (2010 Hr'g Tr. 190:11-15.) The GAL functioned in consultation with the other two members of the PACT team. "We are a unit." (2010 Hr'g Tr. 598:18-20.) The GAL had the authority from the Court to speak to

> any agency, hospital, school, organization, persons or office including the Clerk of this Court, Division of Social Services, Human Services Agencies, private and/or government insurance agencies, CHIP, Medicaid, pediatricians, psychologists, psychiatrists, social workers, therapists, including but not limited to Evy O'Leary, mental health and/or other health providers, police and sheriff departments, mental health clinics, chemical dependency evaluations, the aforementioned shall, **without any additional or further authorization being required from either Barbara Maniaci or Michelle Kulstad**, permit the Guardian ad Litem to inspect and/or copy any and all records, reports, CHIP and/or Medicaid applications, interviews, etc. relating to the children and/or Barbara Maniaci and/or Michelle Kulstad, and shall allow the Guardian ad Litem to speak to all personnel providing any such service or involved in any manner with the minor children and all principals in the case. The Guardian ad Litem is authorized to share all records, reports, interviews, videos, and all other information relating to counseling, therapy, and any other mental health services, including but not limited to all information regarding any alleged abuse or sexual abuse, with Dr. Cindy Miller of the PAC [sic] program, with Dr. Paul Silverman, and with any subsequent psychologist, counselor, therapist or other professional appointed through the PAC [sic] program.

(App. Doc. 22, ¶1.)

The GAL knew Walrod was Maniaci's therapist (2010 Hr'g Tr. 52:11-13). GAL never spoke to Maniaci's therapist before preparing her recommended final parenting plan. (2010 Hr'g Tr. 51:19-52:1-3.) The GAL did not inform the other PACT members of Maniaci's therapist. (2010 Hr'g Tr. 490-491:1-10.) Miller relied on CFSD to make determinations of abuse. (2010 Hr'g Tr. 479:4-8; 2010 Hr'g Tr. 496:8-15.) Miller did not speak to Maniaci or her therapist in preparation of the PACT report. (2010 Hr'g Tr. 486.)

Family integrity is a constitutionally protected interest. *Matter of J.L.B.*, 182 Mont. 100, 594 P.2d 1127, 1132 (1979); *Matter of Guardianship of Doney*, 174 Mont. 282, 570 P.2d 575 (1977). In violation of Maniaci's right to due process, the district court relied upon the decision by CFSD that Maniaci psychologically abused her children. (App. Doc. 15, FOF 16, 17, 18, and 20, p. 33; COL 4 and 5, p. 38.) The Montana Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. Similarly, the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty or property without due process of law . . . ." (U.S. Const. amend. XIV.) Maniaci has a fundamental liberty interest in her children's upbringing which cannot be deprived without due process of law. (App. Doc. 23, citing *In the Matter of*

A.S.A., 258 Mont. 194, 197, 852 P.2d 127, 129 (1993).) Both the federal and state constitutions support parental rights as a fundamental liberty interest, closely guarded from government interference. *Polasek, supra.*

Due process requires notice which is reasonably calculated to inform interested parties of the action and afford them an opportunity to present objections. *Aacen v. San Juan County Sheriff's Dept.*, 944 F.2d 691 (1991), *Finberg* v. *Sullivan*, 634 F.2d 50 (1980). This constitutional concern arises out of the basic unfairness of depriving citizens of life, liberty, or property through the application not of law and legal processes but of arbitrary coercion. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17, 123 S. Ct. 1513, 1519-20 (2003).

Montana has a long tradition of strictly adhering to the procedural requirements of hearing and notice. *Ball v. Gee*, 243 Mont. 406, 795 P.2d 82 (1990). Here, the CFSD reached a decision that Maniaci was psychologically abusing her children without providing her with notice and an opportunity to respond. CFSD did not investigate or proceed in accordance with statutory, regulatory or their internal protocol which would allow Maniaci with a fair hearing. (2010 Hr'g Tr. 527:16-18; 2010 Hr'g Tr. 531:21-23; 2010 Hr'g Tr. 173-174.) Under both federal and state jurisprudence, the requirements for procedural

due process are notice and opportunity for a hearing appropriate to the nature of the case. *See Jones v. Flowers,* 547 U.S. 220, 126 S. Ct. 1708, 1712 (2006), and *Matter of Klos*, 284 Mont. 197, 205, 943 P.2d 1277, 1281 (1997), both citing *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950); *In re K.L.J.K.,* 224 Mont. 418, 421, 730 P.2d 1135, 1137 (1986). CFSD wrongfully branded Maniaci as a child abuser in violation of her fundamental, constitutional rights of due process.

The GAL, PACT, and the district court, in turn, used the decision of the CFSD to deprive Maniaci of custody of her children. The decision of CFSD, reached in violation of Maniaci's constitutional rights, is not reliable, credible evidence to support the district court's final parenting plan. The district court relied in error on the decision of CFSD that Maniaci psychologically abused her children to remove custody from her and award sole custody to Kulstad with supervised visitation only to Maniaci. (App. Doc. 15, FOF 16, 17, 18, and 20, p. 33; COL 4 and 5, p. 38.) The district court had no independent evidence other than CFSD that Maniaci was psychologically abusive to her children to support an order removing custody, imposing supervised visitation, and restricting visitation to Missoula, Montana. (2010 Hr'g Tr. 479:9-13; 2010 Hr'g Tr. 27:3-6; 2010 Hr'g

Tr. 30:7-15; 2010 Hr'g Tr. 410:20-411:1-7; 2010 Hr'g Tr. 418:1-20.) The district court was significantly and improperly influenced by the decision of CFSD.

MANIACI WAS DENIED A MEANINGFUL OPPORTUNITY TO CONFRONT AND CROSS-EXAM EXPERT TESTIMONY IN VIOLATION OF HER DUE PROCESS RIGHTS

Kulstad narrowed Silverman's testimony to the time period in which no written reports, notes, or therapeutic information was provided to Maniaci about her children. (2010 Hr'g Tr. 553-554.) Miller relied on therapy information and notes from Silverman in preparing her PACT report to the court. (2010 Hr'g Tr. 414-416.) Silverman testified based on his therapy with the children and consultations with the parties. (2010 Hr'g Tr. 556-563.) After the hearing, Silverman changed his testimony and attached a copy of his "relevant portion of his notes" to which Maniaci was denied access.[7] (App. Doc. 24.) Maniaci's motion to strike the testimony of the expert witnesses was denied. (App. Doc. 25 and App. Doc. 26.)

Silverman's post-hearing testimony was not subject to cross-examination. The notes produced by Silverman were not made available to Maniaci for cross-examination. (App. Doc. 5.) Maniaci's cross-examination would have been different if such testimony, as contained in the letter, had been given at the

[7] App. Doc. 5.

hearing. Access to the therapy information and notes which were accessible to Miller would have also allowed Maniaci to cross-examine Miller's reliance on the context and credibility of Silverman's notes in reaching the conclusions and opinions she incorporated into the PACT report which was used by the GAL and the court in issuing the Final Parenting Plan.

Miller did not talk or attempt to talk to Maniaci since her custody evaluation and interviews in 2007, upon which the interim parenting plan was based. (2010 Hr'g Tr. 486:13-19.) In preparing her final PACT report, Miller did not meet with the children or Maniaci or Kulstad. (2010 Hr'g Tr. 478:15-24.) Miller did not make an independent investigation of whether the children are exposed to psychological abuse by Maniaci. (2010 Hr'g Tr. 479:9-13.) She did not contact Maniaci's therapists. (2010 Hr'g Tr. 486:7-12.) Miller relied on the reports of CFSD, Silverman's therapy, and [GAL] reports to the Court. (2010 Hr'g Tr. 485-486.) Until shortly before the hearing, Maniaci had no access to the reports to CFSD[8]. At hearing Maniaci had no access to Silverman's records from which he testified and upon which Miller relied. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976).

---

[8] App. Doc. 17.

Maniaci was denied the ability to review her children's therapeutic information and records to determine if they were used accurately (which Silverman's post-hearing testimony disproved), in context and generally whether they are reliable, probative and substantial evidence to support the experts' opinions. Maniaci was denied a meaningful opportunity to confront and cross-exam Silverman in violation of her due process rights and right to fundamental fairness.

CONCLUSION

The permanent protective order issued by the district court denied Maniaci access to her children's therapeutic notes in violation of her statutory and constitutional rights. The district court then allowed experts to testify based on those notes at a subsequent hearing in which the district court terminated Maniaci's custody of her children in its final parenting plan. Maniaci, who has been the primary custodian of her children was awarded supervised visitation to be exercised only in Montana although Maniaci had moved to Tennessee. The Court's Order issuing a Final Parenting Plan was based on unreliable evidence and testimony obtained through the violation of Maniaci's constitutional rights. Therefore, this Court should reverse the district court's decision removing Maniaci as the primary custodian of her children and order the adoption of a parenting plan consistent with the Montana Fourth Judicial District Parenting Guidelines.

Respectfully submitted this 6th day of July, 2010.

By: Linda Osorio St. Peter

Linda Osorio St. Peter
ST. PETER LAW OFFICES, P.C.

Austin R. Nimocks
ALLIANCE DEFENSE FUND

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text, typeface of 14 points, is double spaced, and the word count does not exceed 10,000 words, excluding Certificate of Service and the Certificate of Compliance.

DATED this 6th day of July, 2010.

Judy Haraseth

Judy Haraseth, PLS

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2010, I delivered a copy of the foregoing Appellant's Opening Brief, via U.S. First Class Mail, to:

Michael G. Alterowitz, Esq.
ALTEROWITZ LAW OFFICES, P.C.
327 West Pine Street
Missoula, MT 59802

Susan Ridgeway, Esq.
210 E. Pine Street, Suite 200
P.O. Box 8242
Missoula, MT 59807-8242

Elizabeth L. Griffing, Esq.
ACLU OF MONTANA FOUNDATION
P.O. Box 9138
Missoula, MT 59807

Judy Haraseth

Judy Haraseth, PLS